No. 90-1056

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

CHARLES W. BURSON,

Petitioner,

v.

REBECCA FREEMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

BRIEF OF AMICI CURIAE STATES OF ARIZONA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NORTH DAKOTA, SOUTH DAKOTA, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Does Tenn. Code Ann. § 2-7-111 (Supp. 1990), which prohibits the distribution of campaign literature, display of campaign materials, or solicitation of votes within 100 feet of the entrance to a polling place on election day in Tennessee, violate the Free Speech Clause of the First Amendment of the United States Constitution?

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INTEREST OF AMICI CURIAE

I. THE STATES SHARE AN INTEREST IN PROTECTING THE ELECTION PLACE

Each of the amici states has election protection statutes which "regulate conduct in and around the polls in order to maintain peace, order and decorum there." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The statutes vary as to what activities are allowed or prohibited but all amici pro-

hibit campaigning or electioneering in the election zone; the same prohibition challenged in this case. Accordingly, one interest of these amici is in upholding the statute challenged herein because of the potential applicability of a decision here on laws of those states.

The statutes of all the states for protection of elections have been summarized by petitioner. Pet. for Cert. App. pp. 21a-50a.[1] It will be noted that the statutes vary from those like amicus West Virginia, which prohibit any activity but voting, to the more common model of the other amici, which prohibit only those specified activities the states have found or held to be disruptive to the "peace, order and decorum" of the election area.

The laws of the amici states vary too in the distance from the poll protected. This Court referred to the power of the states to regulate conduct "in and *around* the polls" in *Mills*, 384 U.S. at 218 (emphasis added).[2] Courts below, including the Tennessee court have expressed or implied those courts' judgment as to the proper zone of protection. The states' position is that the size of the protected zone is an appropriate decision for legislatures. However, if an appropriate distance may be determined beyond which the election area may not be constitutionally protected, such considerations should be delineated by this Court. This will avoid piecemeal litigation with election protection zones invalidated while states search for the distance which will satisfy the lower courts.

Under either of two analyses applied by this Court, election protection statutes should be upheld.

First, the states have established election polls and the areas defined about them as dedicated to an exclusive pur-

[1]The appendix refers to Wash. Rev. Code § 29.51.020 as "declared unconstitutional" (citing).

Only section (e) of the statute was invalidated as applied to "exit and public opinion polling" in *Herald v. Munro*, 838 F.2d 380 (9th Cir. 1988). The rest of the statute—including the prohibition on electioneering—is in effect.

[2]The court below paraphrased this as "at the polls." Pet. for Cert. App. p. 14a.

pose: conduct of elections. During the election, these areas are not public fora. At most they are special limited fora in which only the allowed activities for which they are set aside—voting—may occur.

Secondly, the prohibition on electioneering—by any party on either side of an election or ballot issue—is content neutral. The election protection statutes set forth are reasonable time, place, manner restrictions on campaigning activities, allowing adequate fora for continuous campaigning in every area except the election zone.

The amici join in urging this Court to reverse the decision below, uphold the Tennessee law, and make clear the authority of states to protect election areas (possibly including meaningful guidance as to the zone of protection).

A. Importance of Protecting the Poll Area

Voting trends in the country have shown a decline that distresses election administrators and observers. In the most recent presidential elections, the turnout has again declined from 53.10 percent of the voting population in 1984 to 50.15 percent in 1988.[3] There are many explanations for this disturbing decline. It has occurred despite the fact the states have made extensive efforts to increase voter participation. Additional registrars have been added by many states. Educational efforts and a wide variety of publicity efforts, including voter pamphlets, are all directed at increasing voter participation.

Washington is just one state with both state and local voters' pamphlets sent to all homes, not just registered voters. Wash. Rev. Code § 29.81A (1989). Absentee voting has been made as easy as possible in many states.

Most important in these efforts is the voting place itself, and the "peace, order and decorum" of the site, both to make sure that it is appropriate to the voting activity and

[3]*Federal Election Statistics; National Turnout in Federal Elections 1948-1988* (Notes, Federal Election Commission Clearinghouse on Election Administration (April 1989).

to assure the voters will return. Special efforts have been made in this regard by the states. For example, many states, including Washington, had handicapped access to election polls long before it became federal law.

Voting places are selected to ease access for all in recognition that impeded access diminishes vote. Extraordinary efforts—and often substantial costs—are incurred by states to assure access by all voters to an appropriate voting place. It is that important.

In Washington (as in other states) numerous elections have been determined by one vote—or even tied.

Setting aside an election zone serves to protect the electoral process from disruption and to avoid even the *appearance* of impropriety in the election process. This is important because, like the judicial process, the election process produces an outcome by which the rest of society must abide. Protection of the court area is surely constitutional where a form of expression might disrupt, improperly influence, or even appear to influence the outcome. *See Cox v. Louisiana*, 379 U.S. 559 (1965); *United States v. Grace*, 461 U.S. 171 (1983).

Unlike the judicial process, there is no cure for disruption, confusion and the increased possibility of error in the electoral process. The testimony below was that these are probable effects of non-enforcement of the statute in issue here (quoted by trial court, Pet. for Cert. App. pp. 49-5a).

There are other more subtle risks to the electoral process the resultant confusion, disruption and perceived possibility of error all affect a voter's perception of the importance of the vote.

The dual effects of decreasing the vote (cumulative total) and decreasing each voter's perception of the value of voting are *both* important.

In the judical process, reversal and retrial is possible. However, elections can only be reversed at great risk to other interests.

Thus, the need for rules and policies to protect the courts are comparable to the elections problem. Such court rules often prohibit certain activities in and around courts. These areas are not "public fora." For example, many courts, including this one, prohibit photography and broadcasting in courtrooms[4] and the vicinity of courtrooms. Such protection of a court has been held not barred by the first amendment. *Tribune Review Pub. v. Thomas*, 254 F.2d 883, (3rd Cir. 1958).

In the same fashion, the states must be able to protect the peace, order and decorum of the election area.

B. History of an Election Protection Statute in One State

It is helpful to observe in detail the history of such laws governing election areas in one amicus state to determine the reasonableness of these restrictions—or whether a public forum is involved at all. This Court applied such a historical analysis in *United States v. Kokinda*, 110 S. Ct. 3115, 3122 (1990): "The history of regulation of solicitation in post offices demonstrates the reasonableness of the provision here at issue." *Kokinda* at 3122.

An entire Washington constitutional article is devoted solely to elections and protection of the voting right. Wash. Const. art. VI, § 6.

Even before Washington was a state, the Laws of Washington Territory had provided for protection of the right to vote through prohibiting activities which negatively impacted voters. The Code of 1881 (Laws of Washington Territory) chapter CCXLIV § 3140 prohibited "disturbing or hindering" voters.

In 1889, the first Washington Legislature after statehood enacted a statute by which "electioneering" was prohibited "within any polling place, or any building in which

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[4]Letter of Chief Justice Rehnquist to News Organizations, October 27, 1989 declining to allow camera coverage of proceedings.

an election is being held, or within fifty feet thereof." Use of any ballot other than the official ballot was also prohibited.[5] 1889 Wash. Laws 412 § 33.

In 1947, amendments to the statute made it illegal to do "any electioneering, or [to] circulate cards or handbills of any kind." The area of protection was also extended from fifty feet to "within one hundred feet thereof" (referring to the "building in which an election is being held"). 1947 Wash. Laws 35, § 1.

The whole of the Washington elections code was recodified and reenacted at Wash. Rev. Code § 29 (1965) (1965 Wash. Laws 9 (1965)). The above prohibitions became Wash. Rev. Code § 29.51.020.

In 1983, the area covered was defined as 300 feet, and a prohibition on exit and public opinion polls added. 1983 Wash. Laws 33, 1st ex. sess.[6]

Thus, Washington has continuously proscribed electioneering within the election zone. In Washington the election place has never been a forum in which electioneering was allowed.

This is not to imply that such an extended history is necessary to establish that the election area is not a public forum (see infra pp. 7 *et. seq.*). It is appropriate to show there is no doubt that the special purpose of the voting area is otherwise, and that electioneering has been consistently determined by the Washington Legislature to be incompatible.

SUMMARY OF ARGUMENT

There are two errors in the decision of the court below. First is the failure to distinguish between public fo-

[5]This is relevant, since electioneering was, and is, sometimes done through use of a sample "ballot."

[6]Only section (e), the "exit polling" section of the Washington statute was invalidated in *Herald v. Munro*, 838 F.2d 380, 389 (9th Cir. 1988). Even this prohibition was conceded constitutional within the polling place. *Herald*, at 381, fn. 5.

rum cases and those which involve regulation of an area dedicated to a limited purpose; here, the exercise of the right to vote.

The election poll area is not the same as an airport, park or public meeting area; a voting poll area is not a public forum.

Secondly, the court failed to recognize that the prohibition on all campaigning is a content neutral regulation. Accordingly, the "least restrictive" test is not properly applied here.

Finally, the correct test is that applied by the trial court; is this a reasonable time, place, manner regulation? (The trial court correctly answered "yes.") Pet. for Cert. App. p. 5a. It may be necessary to "balance" interests; comparing the public interest in campaigning activity within poll areas with potential affects on the right to vote. In this analysis, the Court should defer to the judgment of the states' legislative bodies.

Since campaigning in the election area detrimentally impacts voting, the compelling interest of the right to vote should be held entitled to protection.

ARGUMENT

I. THE ELECTION AREA IS NOT A PUBLIC FORUM

The election area simply is not a public forum. The court below, without explicitly saying so, treats the election area (at least that from 25-100 feet) as a public forum. This is not a correct characterization of the area in question under decisions of this Court defining a public forum.

Whether a state may legitimately restrict the exercise of first amendment rights, depends in part upon the place the restriction is to protect.

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." . . . The crucial question is whether the manner of expression is basi-

> cally incompatible with the normal activity of a particular place at a particular time.

Grayned v. Rockford, 408 U.S. 104, 116 (1972).

In *Greer v. Spock*, 424 U.S. 828 (1976), the Court noted one criterion was: "the unique character of the Government property on which the expression is to take place." *Greer*, at 842.

There is a "hierarchy of forums" at which the states may restrict expressive activity. *United States v. Grace*, 461 U.S. 171, 176-78 (1983); *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990).

Put another way, this Court has said: "We have identified three types of fora 'the traditional public forum, the public forum created by government designation, and the nonpublic forum.'" *Frisby v. Schultz*, 487 U.S. 474 (1988) *quoting Cornelius v. NAACP Legal & Educational Fund*, 473 U.S. 788 (1985).

In nonpublic facilities, an activity may be excluded which interferes in any way with the functioning of that facility. *Greer v. Spock*, 424 U.S. 828 (1976) (military base), *Pell v. Procunnier*, 417 U.S. 817 (1974) (jail cell).

Though the voting area shares some attributes of nonpublic fora (see especially discussion of private properties used for voting, *infra* p. 10), the voting zone is one of the middle type fora, designated only for certain kinds of activities. As to these fora:

> the crucial question is whether the manner of expression [prohibited] is basically incompatible with the normal activity of a particular place at a particular time.

Grayned v. Rockford, 408 U.S. 104, 116 (1972).

This Court in *Grace* specified the appropriate analysis for these limited fora, when it considered a regulation applied to the grounds of this Court and the sidewalk in front. As to these grounds:

> Although the property is publicly owned, it has not been traditionally held open for the use of the public for expressive activities. . .the property is not transformed into "public forum" property merely because the public is permitted to freely enter and leave the grounds at practically all times and the public is admitted to the building during specified hours.

Grace, at 178.

The most recent consideration by this Court restated the test:

> [C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.

United States v. Kokinda, 110 S. Ct. 3115, 3122 (1990) *quoting Heffron*, 452 U.S. at 650-51.

In *Grace*, the challenged prohibitions were constitutional as to the grounds of this Court, which were not a part of the public forum. As to the surrounding sidewalks, etc., the Court said:

> We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, but we do question whether a total ban on carrying a flag, banner, or device on the public sidewalks substantially serves these purposes.

Grace, at 182.

This Court was drawing a line between the public forum around its building and the building and grounds itself. A similar line has been drawn by each of the states to protect the elections place.

The court below seems to have mistakenly concluded that because sidewalks and parking areas may often be included in the area covered by a 100 foot election zone, this automatically made the area "public forum." This Court directly rebutted this notion in *Kokinda*:

> *Grace* instructs that the dissent is simply incorrect in asserting that every "public sidewalk" is a public forum . . . As we recognized in *Grace*, the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.

Kokinda, at 3120-21.

Respondent attempted to bolster the unstated conclusion of the court below that a public forum was involved, by distinguishing *Kokinda* through emphasizing that the government often does not own the election area, noting that:

> polling place grounds . . . in many cases are located on private property such as churches or private educational institutions. The State makes only limited, temporary use of such properties; . . ."

Brief in Opposition to Pet. for Cert. p. 7.[7]

However, this only supports the conclusion that those polling areas are not public fora. They are not public property and are arranged and set aside by the state only for the specified limited public purpose of voting. Such private areas are not "public fora" during the election, nor are they before or after.

The key to determining whether an area is a public forum is not its ownership—it is the "location and purpose." *Kokinda*, at 3121.

The states have, by the statutes in question, as well as by arranging the area for a polling place (including lease of private property used on this day only), set the voting zone aside as separate from the public forum which surrounds it.

As in *Kokinda*, this does not require a blanket prohibition of all but the dedicated (elections) use—though some states have done so. It suffices, as in *Kokinda*, that the *purpose* is clearly established. The regulation may select and prohibit activities which are known to interfere. Prohibited activities include those which either interfere with or might be anticipated to interfere with the set aside use.

Note, when dealing with the delicate area of elections, this Court has held the state need not actually allow and

[7]This implies that those making other use are guilty of trespass, since the State has arranged the use of the property only for conduct of elections.

prove actual damage (often irreparable) but may act in anticipation. "We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." (*Munro v. Socialist Workers*, 479 U.S. 189 (1986).

The impacts protected against are many, and often subtle. Many voters will turn away before voting because their election area appears crowded, not knowing that the crowding is caused in part by persons conducting last minute campaigns. The resulting congestion also makes it more difficult to conduct and police the actual election. Each of these problems is multiplied with numerous campaigns which might be expected if the decision below stands. (The record below showed over ten at one polling place.)

Another relevant consideration is that voters are "captive listeners" like the residents in *Frisby v. Schultz*, 487 U.S. 474 (1988) (if less so than bus-riders in *Lehman v. Shaker Heights*, 418 U.S. 298 (1974)). They must reach the polling place to vote. The zone at least allows the voters space to decide whether or not they wish to hear or read the campaigning message.

It may even be argued that states are *required* to provide protection of the election areas. Courts have overturned elections in extraordinary situations where the area has not been protected, *e.g.*, where intimidating crowds were allowed to gather around the election polls. *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967).

A case of less extreme facts in which an election was invalidated is *National Labor Relations Bd. v. Carroll Contracting & Ready-Mix*, 636 F.2d 111 (5th Cir. 1981). The court referred to the "'laboratory conditions' test . . . an ideal atmosphere" for elections. *National Labor Relations Bd.*, 636 F.2d at 113, citing cases. Surely, the states should be allowed to conduct elections for U.S. President

in an atmosphere no less ideal than that for a union certification.

Historically, in some states, the polling place and surrounding area have been closed to all activities other than voting. The alternative approach is taken by statutes which restrict the types of activities allowed near the polls.

Election laws of the first type require:

> all persons, except persons in the course of voting, election officers, clerks, watchers, and the like, [to] remain a certain distance from the polling place during the progress of voting.

See 29 *CJS* § 200, pp. 555-56; *Phoenix v. Superior Ct.*, 419 P.2d 49 (Ariz. 1966); *Feld v. Prewitt*, 118 S.W.2d 700 (Ky. 1938).

Statutes like those of amici take the other approach by prohibiting only those certain activities found to be problems. For example, they prohibit electioneering, campaigning, or the distribution of campaign literature within a designated zone while voting is in progress. Either approach is constitutional and within the authority of the states to decide. Both set the voting areas aside as nonpublic fora—dedicated to election purposes.

II. THE STATUTE IS A CONTENT NEUTRAL AND CONSTITUTIONAL TIME, PLACE, MANNER RESTRICTION

A. The Statute is Content Neutral

It bears repeating that this Court has held:

> The First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others.

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

The decision below has confused the test of content-neutrality as expressed by this Court, mistakenly finding the statute to be content-based.

> We, therefore find that section 2-7-111 is content based because it regulates a specific subject matter,

> the solicitation of votes and the display or distribution of campaign materials, and a certain category of speakers, campaign workers.

Pet. for Cert. App. p. 14a.

This confuses categorization based on subject matter—which may still be content neutral—with categories based on viewpoint which are not:

> The fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."

Playtime Theatres v. Renton, 475 U.S. 41, 48-49 (1986) *quoting Police Dept. v. Mosley*, 408 U.S. 95-96. (See also Notes, *Renton and the Content Distinction*, 102 Harvard L. Rev. 1904, 1913, noting the strict scrutiny test is only appropriate in cases of viewpoint discrimination).

Such a distinction is vital, of course, when dealing with an area which is not a "public forum."

In the present judgment, the Tennessee court held the state must use "the least restrictive means. . . ." Pet. for Cert. App. p. 17a. This is the wrong test. Reasonable and evenhanded regulations can be applied to accomplish legitimate state interests.

Assuming arguendo that the statute imposes some burden on protected expressive activity, the impacts must be balanced against the interests to be protected, as this Court has indicated:

> Respondent's proposed activities would seem to implicate First Amendment interests.
>
> Of course, the conclusion that respondent's factual allegations implicate protected speech does not end the inquiry. "Even protected speech is not equally permissible in all places and at all times."
>
> . . .
>
> Where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests.

Los Angeles v. Preferred Communications, 476 U.S. 488 (1986).

The Supreme Court has: "repeatedly recognized the constitutionality of reasonable "time, place and manner" regulations which are applied in an evenhanded fashion." *Lehman v. Shaker Heights*, 418 U.S. 298, 311 (1974). Removing the campaigners (along with other specified activities) to a reasonable distance from the election polls is both reasonable and evenhanded.

That the zone in question was both reasonable and necessary was the conclusion of the voting official who testified. It was, of course, the judgment of the State Legislature which established it. While it is sometimes a convenient fiction to assume legislators are educated in the myriad matters on which they legislate—on elections they qualify as experts.

A balancing is required, weighing the interests protected by the state with the first amendment interests impacted, if any.

> It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest.

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984). The interest of the state in protecting its elections will be discussed below to show such an interest is much *greater* than the aesthetic interests considered in *Vincent*.

In *United States v. Kokinda*, the Court upheld a ban on solicitation on the sidewalk before post offices. In *Frisby v. Schultz*, it upheld a prohibition on picketing before a single residence. These similar regulations served interests much less important than the right to vote which is implicated here.

This statute has not prohibited campaigning and related speech on election day as in *Mills v. Alabama*, 384 U.S. 214 (1966). It merely keeps the robust debate from continuing into the election area.

The testimony below was that ten or more campaign workers were observed outside the zone at one single election area. Pet. for Cert. p. 4. The regulation kept them a short distance from the polls. The witness—and trial court said that but for the restriction, there would be interference with voting, confusion and overcrowding, and mistakes made by election officials. Joint App. at 46; Pet for Cert. App. 4a-5a.

Other problems which reasonably could be envisioned would include arguments between partisans, further disrupting the election areas. Legislators are well qualified to consider the probabilities of such occurrences—though surely knowledge of the capability of campaigning to cause congestion, confusion, and stir argument is hardly unique to legislators.

The result of this slight restriction on the area for campaigning is not to diminish political debate (which has flourished in states with such statutes). Under these statutes, the respondents and others like them remain free to speak, publish or broadcast whatever and however they like.

What the respondents are not free to do, however, is to continue the election debate into the election place. While they are still free to campaign, neither they nor anyone else can do it within a zone defined by the state as part of the voting place.

B. The Interest of the State; the Right to Vote and Protection of Election Polls

Each state's election protection statute implements the constitutional right to vote and safeguards a place for its exercise. The court below failed to fully discuss the right to vote and how it is implicated in this case. Thus, neither the United States constitutional provisions providing for elections, (U.S. Const. art. I, §§ 2, 4 and art. III § 1), nor the many important cases on the subject of the right to vote were mentioned.

These constitutional provisions do more than delegate authority to the states to legislate for elections. The Constitution confers a constitutional right to vote which the states are required to protect: the right to vote in federal elections is conferred by the art. I, § 2. U.S. Constitution. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966), citing *United States v. Classic*, 313 U.S. 299 (1960).

If prioritizing of rights is necessary in this case, the right to vote is fundamental: "The political franchise of voting [is] a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356 (1885).

The most important question in this case is one of protecting voting. The primacy of the voting right is clear and unnecessary infringement of that right is not to be tolerated because of incidental or speculative impact on first amendment rights:

> Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533 (1964).

The demand to be allowed in and around the election polls to harass voters for last minute campaigning is properly regulated by the states. When this last minute campaigning in an election area and the resulting congestion, confusion and possible errors in elections, are subjected to the "careful meticulous scrutiny" the Court suggested above, it will be found the state's regulation is justified.

This Court has once given specific consideration to the appropriateness of measures to protect the election. *Mills v. Alabama*, 384 U.S. 214 (1966). In invalidating a "prior restraint" statute prohibiting editorial comment the day before the election, the Court took care to note that the decision did not imply the state could not protect the election polls:

> We should point out at once that this question in no way involves the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there. . . .

Mills, at 218.

Clearly, the states have such power and are probably required to exercise it where necessary to protect the right to vote.

The legitimacy of the interests which the states seek to preserve in their election statutes was again recognized by the Court in *Brown v. Hartlage*, 456 U.S. 45 (1982):

> We begin our analysis . . . by acknowledging that the States have a legitimate interest in preserving the integrity of their electoral processes . . . a State has a legitimate interest in upholding the integrity of the electoral process itself.

Brown, at 52.

The interest of the State in adopting the statute here in question is surely greater than the governmental interests involved in *Houchins v. KQED*, 438 U.S. 1 (1978), *Kokinda*, 110 S. Ct. 3115 (1990), or *Frisby*, 487 U.S. 474 (1988). In *Houchins*, the interest was prevention of possible disruption in the running of a jail. In *Kokinda*, it was to avoid disrupting the postal service' business, and in *Frisby*, to protect residential privacy.

Here, the interest of the State is in safeguarding the most important right that citizens enjoy, the right to vote free from "interference with voting, confusion, and overcrowding at the polling places and mistakes made by election officials" Trial court quoting state witness, Pet. for Cert. App. 5a.

Like an individual returning to his home in *Frisby*, the voter is in large part a captive audience. Establishing a protected zone with a perimeter around the election area establishes a balance by allowing the voter to exercise a choice of whether he is willing to receive the proferred campaign message, or prefers to go directly to vote.

The statute challenged was adopted for the protection of the integrity of the electoral process. This interest is sufficiently substantial to justify any incidental impact on the respondent. The trial court had concluded the State's interest was "a compelling state interest with respect to the protection of voters and election officials from interference, harassment or intimidation during the voting process." Pet. for Cert. App. p. 5a.

The Tennessee Supreme Court admitted "the State unquestionably has shown a compelling interest in banning solicitation of voters or distribution of campaign materials *within the polling place itself*" but held this interest did not extend to 100 feet—and/or that a "less restrictive" boundary was appropriate (suggesting, but not holding 25 feet would be upheld). Pet. for Cert. App. p. 18a (emphasis in original). Under the appropriate test, the regulation—and the zone chosen by the state—should be upheld.

CONCLUSION

The polling place exists for a very limited time and for one limited and clearly designated activity: voting. The sanctity of the act and place could be the subject of extended metaphysical discussion. Elections are probably even more important than the courts and the judicial process (with all due respect to the present forum). The voting function, like that of courts, requires a protected area.

States have properly acted to defend the constitutional right to vote by enacting an election law intended to protect that right and the place in which it is exercised.

The statute challenged is a constitutional exercise of the "state's power to regulate conduct in and around the polls in order to maintain peace, order and decorum . . ." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

The contrary decision of the court below should be reversed.

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Respectfully submitted,

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